No. 77-1305

In the Supreme Court of the United States

OCTOBER TERM, 1978

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH, PETITIONERS

v.

LEO M. SHORE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether petitioners are entitled to a jury trial to relitigate questions decided adversely to them in an injunctive proceeding brought by the Securities and Exchange Commission.

INTEREST OF THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION

The United States has an interest in the expeditious and consistent resolution of private actions seeking redress for violations of federal laws, and the Commission has such an interest concerning the securities laws in particular. As this Court recently reaffirmed in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 444, private suits help to achieve the remedial purposes of the securities laws, and they are necessary supplements to Commission action. See also *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381-383; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-433.

Nonetheless, private litigation to enforce federal statutes imposes significant costs on both the parties and the judicial system. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741-744. Although the volume of private securities litigation is small compared with other filings, many securities cases are quite complex.[1] The efficient enforcement of the laws

[1] From 1973 through 1977, securities and commodities litigation in the federal courts represented between 1.5 percent and 2.3 percent of the total number of civil actions filed per year. During that same period, securities and commodities cases represented between 6.95 percent and 9.84 percent of the civil actions that had been pending in the district courts for three years or more. In addition, while only a small percentage (between .39 percent and .59 percent) of civil cases required 20 days or more for trial, approximately five times as many securities and commodities cases (between 1.4 percent and 3.28 percent) required more than 20 days for trial. Fully 13 percent of the civil trials lasting 20 days or longer were in securities or related actions. The statistical appendix to this brief sets out the pertinent data. See also *Manual for Complex Litigation* § 0.22 (1977).

that the Commission and other federal agencies are charged with administering can be promoted through the application of the collateral estoppel doctrine.[2] Collateral estoppel could both reduce the cost of private litigation and increase the effectiveness of judgments obtained in actions brought by the Commission and other federal agencies.[3]

The Commission and the United States have a further interest here because the court of appeals indicated that petitioners might have protected their right to a jury trial by obtaining a stay of the injunctive action brought by the Commission. If Commission injunctive proceedings were suspended pending the outcome of private damage actions, or if it were necessary to empanel juries in such proceedings, the Commission's ability to obtain prompt injunctive relief to protect the public against securities law

[2] The United States has previously expressed its interest in the fair and effective use of collateral estoppel in private litigation under the federal patent laws by supporting, as *amicus curiae*, the relaxation of the mutuality doctrine in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313.

[3] Several federal agencies have the authority to seek injunctions to enforce the statutes they administer, and many of those statutes also can be enforced by private damage actions. See, *e.g.*, *Allen* v. *State Board of Elections*, 393 U.S. 544, 556-557 (Voting Rights Act of 1965); *Stewart* v. *Travelers Corp.*, 503 F.2d 108 (C.A. 9) (Consumer Credit Protection Act of 1968). Cf. *Regents of the University of California* v. *Bakke*, No. 76-811. decided June 28, 1978, slip op. 11-14 (opinion of Stevens, J.) (Title VI of the Civil Rights Act of 1964).

violations would be seriously impaired. Other federal agencies with the authority to seek injunctions also could be prevented from securing expeditious relief against ongoing violations of their statutes.

STATEMENT

This class action was commenced in November 1974 by respondent, a shareholder of petitioner Parklane Hosiery Company ("Parklane"). Respondent alleged that Parklane and 12 of its officers, directors, and stockholders had issued a materially false and misleading proxy statement, in violation of Sections 14(a), 10(b), and 20(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 891, 899, as amended, 15 U.S.C. 78n(a), 78j(b), and 78t(a), and various rules and regulations promulgated by the Commission.

Respondent's grievances grew out of a merger, which had converted Parklane into a privately owned company controlled by the defendants. The defendants caused a proxy statement to be sent to Parklane's stockholders advising them that, on October 14, 1974, there would be a meeting to consider the merger proposal. After that meeting, the merger was consummated and each of the minority shareholders, including respondent, received $2 per share for his holdings, subject to dissent and appraisal rights under New York law (Pet. App. 3a).

The amended complaint (App. 25a-37a) alleged that the proxy statement issued to the shareholders was false and misleading in the following respects:

1. the statement set forth reasons why Parklane should be merged into a privately-held company without disclosing that the overriding purpose of the merger was to allow petitioner Somekh (Parklane's president) to meet his personal obligations through salary increases and other transactions that would occur after the closing of the merger,
2. the statement made assertions about the purported termination of negotiations with the Federal Reserve Board for cancellation of a lease held by Parklane, without disclosing that there were ongoing negotiations that could result in substantial financial benefits to Parklane, and
3. the statement asserted that Parklane had retained two expert appraisers, who determined that the fair value of Parklane stock prior to the offer was $2 per share, without disclosing that the appraisers had not been furnished with sufficient information to prepare an accurate evaluation.

The complaint sought damages, recission of the merger, and recovery of costs (App. 36a-37a).

In May 1976, before this private action was ready for trial, the Securities and Exchange Commission filed suit seeking an injunction against petitioners. The Commission alleged that the proxy statement issued by Parklane was materially false and misleading in essentially the same respects as those alleged in the private action (Pet. App. 4a).[4] After a four-day

[4] After the filing of the Commission's proceeding, respondent amended his complaint in the private action to conform to the Commission's complaint (App. 24a-37a).

trial in which petitioners had ample opportunity to introduce evidence and cross-examine witnesses called by the Commission, the district court held that the proxy statement violated Section 14(a) of the Act and Rule 14a-9 thereunder, 17 C.F.R. 240.14a-9.[5] The district court found that the proxy statement (1) failed to disclose that the " 'overriding purpose for the merger was to enable [petitioner] Somekh to repay his personal indebtedness,' " (2) falsely represented that " 'no negotiations' " were taking place with the Federal Reserve Board with respect to the cancellation of Parklane's lease when in fact such negotiations had resumed and were likely to result in substantial financial benefits to Parklane, and (3) failed to disclose that the expert appraisers had not been informed of facts pertinent to their evaluation of Parklane's shares. *Securities and Exchange Commission* v. *Parklane Hosiery Co.*, 422 F. Supp. 477 (S.D. N.Y.). The district court further found that each of the foregoing misstatements or omissions was

[5] Rule 14a-9 provides in pertinent part:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

"material" under the standard established in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438.[6] The court of appeals affirmed, agreeing with the judgment of the district court, and specifically upholding each of the district court's findings and its conclusions regarding materiality. 558 F.2d 1083.

Respondent then moved for partial summary judgment against petitioners (App. 53a), asserting that the findings and conclusions of the district court in the injunctive proceeding collaterally estopped them from relitigating the same issues. The district court denied that motion (Pet. App. 26a), relying on *Rachal* v. *Hill*, 435 F.2d 59 (C.A. 5), certiorari denied, 403 U.S. 904.

On interlocutory appeal under 28 U.S.C. 1292(b) (see App. 55a-57a), the court of appeals reversed. It held that the doctrine of collateral estoppel barred petitioners from relitigating the questions resolved against them in the enforcement action; it also held that the Seventh Amendment does not require a jury trial of those questions in the circumstances of this case (Pet. App. 7a-19a). The court stated that "the Seventh Amendment preserves the right to a jury trial only with respect to issues of fact, [and] once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury" (Pet. App. 9a).

[6] The district court declined to grant permanent injunctive relief against the defendants in the enforcement action, but it ordered them to correct various misstatements in documents previously filed with the Commission (Pet. App. 6a).

SUMMARY OF ARGUMENT

I

Because petitioners have had the opportunity fully and fairly to litigate the questions decided adversely to them in the prior injunctive proceeding, the doctrine of collateral estoppel bars them from relitigating those questions. The interests of finality, certainty, and economy of judicial resources preclude further litigation, even though one of the parties in the present case was not a party in the earlier suit. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313.

The principles expressed in *Blonder-Tongue* are applicable whether the plaintiff or the defendant seeks to relitigate questions that have been resolved in a trial that was fair and adequate. Relitigation involves a waste of private and public resources. This is especially true in private securities cases, which tend to be protracted in both their trial and pretrial stages. It is inappropriate, in the absence of circumstances demonstrating actual unfairness, to afford litigants duplicate trials in federal court on questions previously adjudicated.

II

The Seventh Amendment is not a barrier to the application of collateral estoppel in this case. Collateral estoppel does not deny any party the right to trial by jury, because a jury is necessary only to determine those issues about which there is a genuine factual dispute. Where factual issues have been re-

solved in a prior judicial proceeding in which the party subject to estoppel has had a full and fair opportunity to litigate such issues, there is no further fact-finding function for the jury to perform. This Court's decision in *Katchen* v. *Landy*, 382 U.S. 323, confirms that where, as here, a factual determination has been made by a court of equity pursuant to a statutory scheme requiring a prompt hearing by that court, the doctrine of estoppel may be applied without infringing the Seventh Amendment. The approach in *Katchen* is supported by the common law practice in 1791. In 1791 it was well settled, in both England and the United States, that equitable determinations could collaterally estop relitigation in subsequent actions at law.

It makes no constitutional difference that the doctrine of "mutuality of estoppel" prevailed in 1791 but since has been eroded. This Court has held repeatedly that the adoption of new procedural rules, which merely serve to remove from the jury's domain those questions about which there is no genuine controversy, do not impair Seventh Amendment rights. Thus, the grant of summary judgment or a directed verdict under modern procedural rules, unknown in 1791, has been upheld because "[t]he [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing." *Galloway* v. *United States*, 319 U.S. 372, 390-391. Here,

as in *Colgrove* v. *Battin*, 413 U.S. 149, 157, " '[n]ew devices may be used to adapt the ancient institution [of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice.' "

We are concerned, however, by the court of appeals' indication that a defendant in a Commission injunctive proceeding may be entitled to a trial by jury, or to a stay of the injunctive proceeding pending the outcome of private litigation, so that the defendant will enjoy the maximum opportunity to have a jury resolve factual disputes before an equity court does so. As we demonstrate at pages 26-30, *infra*, the Commission's injunctive proceedings are equitable in nature, and the defendant cannot obtain a jury trial in them. Congress has provided, moreover, that unless the Commission consents such proceedings may not be consolidated or coordinated with private litigation.

ARGUMENT

I

PETITIONERS MAY NOT RELITIGATE ISSUES THAT HAVE BEEN DETERMINED ADVERSELY TO THEM AFTER A FULL AND FAIR TRIAL IN THE COMMISSION'S ENFORCEMENT PROCEEDING

Petitioners object (Br. 17-21) to the application of collateral estoppel to preclude relitigation of the question whether their omissions were materially misleading. This objection, however, seems to have little to do with the doctrine of "mutuality" or with the difference between "offensive" and "defensive" collateral

estoppel. Petitioners concede, for example, that collateral estoppel would apply if they had a jury trial in the Commission's injunctive action or if they had had an opportunity for a jury trial in that action (Br. 14 n. *, 25-26 and n.*). It must be, therefore, that petitioners' objections revolve entirely around the Seventh Amendment. We believe, however, that arguments that would allow relitigation here, even if there had been an opportunity for a jury trial in the Commission's action, would be incorrect.

There are many issues in common between this case and the injunctive proceeding. Both complaints challenged the same misrepresentations and omissions in Parklane's proxy statement; both alleged that those omissions and misrepresentations were "material" (Pet. App. 7a). Petitioners do not dispute the conclusion of the court of appeals that they "were accorded a full and fair opportunity to try those issues in the prior proceeding" and were fully aware of the pendency of the private action while they were vigorously litigating the common issues (*id.* at 7a, 14a-15a). "The interests of finality, certainty and economy of judicial resources" (*id.* at 9a) consequently preclude further litigation on those questions.

Collateral estoppel prevents repetitious litigation on questions "distinctly put in issue and directly determined by a court of competent jurisdiction." *Parmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 101 n. 7.[7]

[7] Collateral estoppel applies when "the very fact or point now in issue was, in the former action, (1) litigated by the parties; (2) determined by the tribunal; and (3) necessarily

Although early decisions of this Court declined to apply the doctrine of collateral estoppel unless both of the parties (or their privies) were bound by the judgment in the prior case, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, established that an issue may be precluded, despite lack of mutuality, where the party subject to estoppel had a full and fair opportunity to litigate the questions raised.

This Court recognized in *Blonder-Tongue* that it is not tenable "to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Id.* at 328. The Court stressed "the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases" (*ibid.*), and it described the touchstone for applying the doctrine of collateral estoppel in the following terms (*id.* at 329):

> Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

The principle of *Blonder-Tongue* is applicable "offensively," at the instance of a plaintiff, just as it can be invoked "defensively," where the party sought to be estopped had an opportunity for a full and fair

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so determined." James and Hazard, *Civil Procedure* 563-564 (1977). See also 1B Moore's *Federal Practice* ¶ 0.441[1-2] (1974).

hearing. 402 U.S. at 330 n. 19. See also, *e.g.*, *Johnson* v. *United States*, 576 F.2d 606 (C.A. 5); *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 954-956 (C.A. 2) (Friendly, J.); *United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709, 725-729 (D. Nev.), affirmed in relevant part, 335 F.2d 379, 404 (C.A. 9); *Garcy Corporation* v. *Home Insurance Co.*, 496 F.2d 479, 483 (C.A. 7); *Humphreys* v. *Tann*, 487 F.2d 666, 669-671 (C.A. 6).[8]

Although there may be situations in which "offensive" use of collateral estoppel by someone who was not a party to the first case would be undesirable, this is not such a case.[9] In litigation brought by the government, where the defendant knows there is or will be private litigation as well, the outcome of the

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[8] See James and Hazard, *supra*, at 582: "Most courts which have repudiated the mutuality rule now appear ready to apply the rule of issue preclusion either offensively or defensively, if the circumstances do not make it inequitable to do so." Accord: ALI, *Restatement (Second) of Judgments* § 88 and Reporter's Note (Tent. Draft No. 2, 1975). See also Comment, *The Use of Government Judgments in Private Antitrust Litigation*, 43 U. Chi. L. Rev. 338, 345-354 (1976); Vestal, *Res Judicata/Preclusion* 317-322 (1970).

[9] For example, if the stakes in the first litigation were so low that the parties did not have an incentive to try the case fully, there might be an unusually large likelihood that the first decision was wrong, and rules of civil procedure should not perpetuate results that are likely to be incorrect. See Posner, *Economic Analysis of Law* 454-455 (2d ed. 1977). But when the first proceeding was fully contested—and when the parties in the first action knew that the other suit was pending or likely to be brought—then there is no reason to think that a second litigation would produce results more accurate than those of the first.

trial "represents the closest approximation to objective certainty possible in litigation." Comment, *The Use of Government Judgments in Private Antitrust Litigation*, 43 U. Chi. L. Rev. 338, 350-351 (1976). Such defendants have ample incentive to litigate the issue fully in whatever proceeding first goes to judgment. Petitioners litigated fully in the Commission's suit. Their argument against collateral estoppel therefore must be that despite full litigation, and despite the detailed findings of the district judge and the three appellate judges in the first case, they should have an opportunity to try the same factual issues again with more fact finders. That argument fails when tested by the standards of *Blonder-Tongue*.

Some commentators have expressed concern that, if plaintiffs who are not bound by the first judgment may invoke collateral estoppel "offensively," those plaintiffs would "sit on the sidelines" in the first action knowing that they can reap the fruits of victory without taking the consequences of defeat. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 Colum. L. Rev. 1457, 1473 (1968). Private plaintiffs, however, must "sit on the sidelines" during the Commission's injunctive actions, because Congress has determined that their disposition should not be delayed by intervention. See the 1934 Act, 15 U.S.C. 78u(d); *Securities and Exchange Commission* v. *Everest Management Corp.*, 475 F.2d 1236, 1240 (C.A. 2). See also James and Hazard, *supra*, at 581.

The "mutuality" doctrine was eroded and eventually abolished because it disregarded the costs of

litigating the same issue more than once. The Court remarked in *Blonder-Tongue* (402 U.S. at 334) that the costs of patent litigation may be " 'staggering' " and that patent cases consume "an inordinate amount of trial time" (*id.* at 336-337). The same may be said of securities cases (see note 1, *supra*). There is no general reason to think that the result of a second litigation is fairer or more accurate than the first, and there is no reason for the judicial system to expend time, effort, and money to duplicate proceedings when the prospect of a "better" result is no more than a shadow. Here, as in *Blonder-Tongue*, it is important to conserve judicial resources—and the resources of the parties—by curtailing relitigation.

Amicus Washington Legal Foundation argues (Br. 7-8), however, that allowing parties who are not bound by the first judgment to take advantage of it will coerce defendants to settle injunctive proceedings. In other words, *amicus* argues that the collateral estoppel rules will affect the outcome of the first proceeding in a way that makes that outcome less fair and less likely to be accurate. If this were so, it would be a serious objection to the position we take here. But the contention of *amicus* does not withstand scrutiny.

The argument of *amicus* hinges on the supposed unfairness of pressures that make settlement more attractive. This Court, however, often has expressed the view that there is a strong public interest in the

settlement of litigation,[10] and if the application of collateral estoppel makes settlement more attractive that would be an argument in its favor. Moreover, most injunctive actions brought by the Commission already are settled,[11] and it seems unlikely that the application of collateral estoppel principles would cause any additional settlements to be unfair or coercive. What is more, private securities actions often involve issues that are not litigated in actions brought by the Commission. For example, issues such as whether the misrepresentation caused damages, whether it was relied on, and the quantum of damages are raised only in private actions, as Congress has recognized. See S. Rep. No. 94-75, 94th Cong., 1st Sess. 76 (1975). A defendant's decision to litigate against the Commission, therefore, does not guarantee that every private plaintiff could ride the Commission's coattails. Because of the difference in issues, it is unlikely that defendants in injunctive actions will be unfairly affected by the prospect of collateral estoppel.

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[10] See, *e.g.*, *Williams* v. *First National Bank of Pauls Valley*, 216 U.S. 582, 595; *St. Louis Mining and Milling Co.* v. *Montana Mining Co.*, 171 U.S. 650, 656.

[11] Approximately 89 percent of the defendants named in the Commission's injunctive actions between October 1, 1976, and September 30, 1977, settled their cases. (A search of the Commission's files revealed that 641 of the 715 defendants during this period chose to settle.) During this time *Rachal* v. *Hill*, *supra*, was the only appellate case dealing with the relationship between the Seventh Amendment and collateral estoppel in private suits following the Commission's injunctive actions.

Even if the issues in the Commission's suit and the private litigation were identical, however, it would not follow that recognition of collateral estoppel would lead to any "coercion" to settle. Any form of collateral estoppel—offensive or defensive, mutual or non-mutual, with or without a jury trial in the first proceeding—may raise the stakes of litigation by allowing a single litigation to influence the result in more than one case. This should not cause any party to be under unfair pressures in the first litigation. To the contrary, when the stakes of litigation increase, the parties simply have greater incentive to discover the facts and investigate the legal arguments; the investment necessary to make the disposition of the first litigation as fair and as accurate as possible might be infeasible in litigation involving small stakes. Suppose that a full litigation in a securities case would cost the defendant $100,000. If the stakes of the suit are small the defendant is unlikely to invest the time and money necessary to litigate the questions fully; he may be pressured, by litigation costs alone, to settle. But if the stakes are substantial, it is much more attractive for the defendant to litigate the case as fully as possible in an attempt to prevail outright.[12] Moreover, if a case with significant stakes proceeds to trial, the importance of the decision will ensure that the issues are litigated vigorously, thus

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[12] The parties' decision to litigate rather than to settle also depends on their attitudes toward risk and their assessments of the probability of prevailing after trial. See Posner, *supra*, at 434-441.

increasing the reliability of the decision and strengthening the argument for invoking that decision in subsequent cases.

II

THE SEVENTH AMENDMENT DOES NOT REQUIRE A JURY TRIAL OF ISSUES FULLY LITIGATED IN A PRIOR CASE

The Seventh Amendment does not require a jury to try every issue in civil litigation. There is no need for a jury in equitable suits. In suits at law there is no need for a jury unless there is a genuine dispute concerning a material fact. *Galloway* v. *United States*, 319 U.S. 372. The right to a jury may be forfeited if not asserted expeditiously. Fed. R. Civ. P. 38. Petitioners concede that there is no need for a jury in a second trial if there either was or could have been a jury in the first trial (see Pet. Br. 14 and n. *, 25-26 and n. *). Indeed, to argue that there must be a jury in every proceeding is to argue for the abolition of *res judicata* and collateral estoppel. Petitioners do not venture so far. But there is no sound reason to make the collateral estoppel effects of judgments depend on whether there could have been a jury in the first proceeding. The Seventh Amendment permits a party to insist that a jury resolve certain disputed factual issues in actions at law, but it does not require the legal system to treat particular issues as open to factual dispute. Collateral estoppel removes particular issues from the class of issues open to dispute, and its scope therefore does not depend on the availability of a jury in the first trial.

A. The Common Law Incorporated by the Seventh Amendment Recognizes the Collateral Estoppel Effect of Prior Equitable Determinations

The decisions of this Court establish that "the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791 * * *" (*Curtis* v. *Loether*, 415 U.S. 189, 193), and that trial by jury is available in federal suits involving "rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty" (*Pernell* v. *Southall Realty*, 416 U.S. 363, 375). But it is equally clear that the Seventh Amendment "did not purport to require a jury trial where none was required before." *Atlas Roofing Co., Inc.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442, 459. The common law has long recognized that estoppel bars relitigation in courts of law of questions previously decided in courts of equity, and that principle determines the availability of jury trials.

The common law in 1791 recognized that issues tried before the equity chancellor need not be relitigated before a jury. See *Hopkins* v. *Lee*, 6 Wheat. 108, 112, summarizing this long-established rule in England and the United States. See also *Smith* v. *Kernochen*, 7 How. 198, 217-218; *Brady* v. *Daly*, 175 U.S. 148, 158-159; and Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal* v. *Hill*, 85 Harv. L. Rev. 442, 448-458

(1971), which demonstrate acceptance of this principle on both sides of the Atlantic prior to 1791.[13]

In light of this established rule, the Court concluded in *Katchen* v. *Landy*, 382 U.S. 323, 337-339, that equitable judgments have estoppel effects in actions at law. *Katchen* held that a bankruptcy court, sitting as a statutory court of equity, could dispose of a trustee's objection to the claim of a creditor, even though issues concerning the objection otherwise would have been litigated before a jury. The Court recognized that acceptance of the creditor's Seventh Amendment objection to this procedure would not be "consistent with the equitable purposes of the Bankruptcy Act nor with the rule of *Beacon Theatres* [v. *Westover*, 359 U.S. 500] and *Dairy Queen* [v. *Wood*, 369 U.S. 469] which is itself an equitable doctrine." 382 U.S. at 339. This meant that some factual issues would never be tried by a jury, but, as the Court later observed in *Atlas Roofing*, *supra*, 430 U.S. at 458, "whether a fact would be found by a jury [always has] turned to a considerable degree on the nature of the forum in which a litigant found himself." If by chance the litigant first found himself in an equity court, as in *Katchen*, the essential facts would be found there. Then there would be nothing left for a jury to do in any subsequent suit involving the same facts.

[13] Treatise writers summarizing the common law rule have pointed out that "[i]n that large class of actions in which the jurisdiction in equity and at law is concurrent, an issue determined in either tribunal is [conclusive] in the other." 2 Van Fleet, *Former Adjudication* 682 (1985). The *Restatement ~~(Second)~~ of Judgments* § 68, comment J (1942), reiterated the common law rule as follows: "Where in a proceeding in equity a question of fact is actually litigated and determined by a valid and final decree, the determination is conclusive between the parties in a subsequent proceeding either at law or in equity on a different cause of action."

The rationale of *Katchen* applies in this case as well. The Commission's proceeding in equity in the present case, which resulted in the findings and conclusions which give rise to collateral estoppel, was brought pursuant to Section 20(b) of the Securities Act of 1933, 48 Stat. 86, as amended, 15 U.S.C. 77t(b), and Section 21(d) of the Securities Exchange Act of 1934, 48 Stat. 900, as amended, 15 U.S.C. 78u(d). Here, as in *Katchen*, a specific statutory scheme requires the prompt resolution of factual issues in a court of equity. Once the facts have been found, there is no reason to find them again in another forum. *Katchen* holds at least that the Seventh Amendment allows a court of law to give collateral estoppel effect to the decision of the equitable tribunal.[14] Thus the fact that petitioners *could not* have

[14] In other contexts, similar principles have accommodated government enforcement of a federal statute and related private litigation. For example, although a plaintiff claiming treble damages under the antitrust laws has a right to trial by jury in any judicial proceeding, certain issues of fact may be determined by an administrative agency and need not be relitigated in the district court (*Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 306). An argument that this procedure "amount[s] to a deprivation of * * * Seventh Amendment rights" (*Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (C.A. 7)) was rejected by this Court. *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 115.

obtained a jury trial in the injunctive action does not assist them here.

B. It is Not Material that Respondent Was Not a Party to the Equity Action

1. If, as *Katchen* holds, facts found in an equitable proceeding are conclusive in a later action at law even though there could not have been a jury in the equitable proceeding, then petitioners can prevail here only if *Katchen* depended on the "mutuality" doctrine. But petitioners do not suggest any reason why the Seventh Amendment issue should depend on the identity of their opponent in the first trial. No matter who the opponent was, it is true that facts were found, without a jury, in a proceeding that gave petitioners a full opportunity to litigate. Those facts being settled, as *Katchen* establishes, there are no facts for a jury to find. The rules of mutuality of estoppel simply have nothing to do with Seventh Amendment principles.

Moreover, the Seventh Amendment did not "freeze equity jurisdiction as it existed in 1789" (*Atlas Roofing*, *supra*, 430 U.S. at 459), and that amendment "was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases" (*id.* at 460). There has always been room for procedural changes, such as the abolition of the mutuality rule, that affect when (if at all) a jury is needed to find facts. The Court consistently has upheld innovations that define the nature of disputed issues and remove from the jury's domain certain issues about which there is no genuine dispute.

Galloway v. *United States*, 319 U.S. 372, 388-393, illustrates this process. A new rule of federal procedure enabled a judge to direct a verdict for a party after hearing evidence. The losing party argued that this procedure unconstitutionally transferred to the court a decision that the Seventh Amendment left to the jury. This Court rejected that argument, reasoning (*id.* at 390-391):

> The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were the 'rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system.

The Court also noted that the Seventh Amendment does not compel "endless repetition of litigation and unlimited chance, by education gained at the opposing party's expense, for perfecting a case at other trials." *Id.* at 392-393. See also *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 497-498 (retrial limited to question of damages comports with Seventh Amendment); *Ex parte Peterson*, 253 U.S. 300, 309-311; *Souffront* v. *Compagnie Des Sucreries*, 217 U.S. 475, 487 (*res judicata* does not offend the Seventh Amendment because, when one decision has resolved a controversy, no issue remains for jury trial); *Fidelity & Deposit Co.* v. *United States*, 187

U.S. 315, 319-321 (summary judgment procedures comport with Seventh Amendment because they simply determine when there is no federal dispute for a jury to resolve).

These cases establish that new procedural rules comply with the Seventh Amendment—even if they curtail the scope of jury trials—when they do no more than determine whether there is a genuine factual issue for jury resolution. The cases also demonstrate that " '[n]ew devices may be used to adapt the ancient institution [of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice.' " *Colgrove* v. *Battin*, 413 U.S. 149, 157. These and similar decisions fully support the assessment of Professors Shapiro and Coquillette, *supra*, 85 Harv. L. Rev. at 454-456, that:

> There are * * * affirmative reasons for rejecting [the argument] based on the law of mutuality as it stood in 1791. First, it would reduce the historical inquiry to an absurdity. Since mutuality is only one aspect of the broader doctrine of res judicata, would it not follow from acceptance of the defense that the precise boundaries of the entire doctrine as of 1791 would have to be marked? That, for example, developments in the doctrine with respect to 'privity,' 'finality,' the meaning of a judgment 'on the merits,' the distinction between ultimate and mediate facts, etc. would all have to be given fixed dates of birth before it could be decided whether a judgment in equity precludes relitigation at law? Even the hardiest antiquarian would, and should, blanch at the prospect of such an undertaking.

> * * * If collateral estoppel is otherwise warranted, the jury trial question should not stand in the way.

The prior injunctive proceeding settled some of the issues raised by the complaint in this private damage action. As to those issues, there is no longer a genuine dispute requiring jury determination. Thus, the question whether the proxy statement contained misrepresentations and omissions has been determined, and the question whether those defects were "material" in nature has also been determined. But, as respondent appears to concede (Br. 26), some disputed issues remain for jury resolution in this case; those issues may include causation, reliance, and damages.[15] Collateral estoppel narrows the issues here but does not obviate the need for a jury trial. The decision of the court of appeals in this case leaves open for initial determination in the district court the scope of collateral estoppel; it is appropriate for that court to determine in the first instance what issues remain for trial before the jury.

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[15] As this Court emphasized in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386-390, the plaintiff in a private action under the proxy rules is not entitled to relief simply because the proxy solicitation contained material misrepresentations or omissions. And, as this Court has made clear, "damages should be recoverable only to the extent that they can be shown." The Second Circuit has held that an injunctive proceeding brought by the Commission will not have a preclusive effect where additional questions have not been adjudicated. *Securities and Exchange Commission* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 96 n. 4.

2. Petitioners avoid most of our arguments. In their view, this Court already has held that decisions in an equitable proceeding cannot preclude later consideration of the same issues by a jury. But the cases on which petitioners rely—*Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469—hold only that where both legal and equitable claims are "presented in a single case" (369 U.S. at 472), a trial by jury is required on all factual issues involved in a common law cause of action. The cases establish a rule for the sequence of litigation within one case. As the court of appeals observed (Pet. App. 10a-13a), those cases support the result here because the Court assumed that a prior determination in equity without a jury would be preclusive in later proceedings at law. Unless the decision in equity would have a collateral estoppel effect, there would have been no reason to require a particular order of proof. Shapiro and Coquillette, *supra*, 85 Harv. L. Rev. at 445-448. *Katchen*, which was decided after *Beacon Theatres* and *Dairy Queen*, confirmed what the Court had assumed. See pages 19-21, *supra*.

Petitioners' reliance on *Dimick* v. *Schiedt*, 293 U.S. 474, fares no better. *Dimick* held that *additur* (an increase by the judge of the amount of damages awarded by the jury) violates the Seventh Amendment because the common law "forbade the court to *increase* the amount of damages" (293 U.S. at 482). *Dimick* had nothing to do with rules that identified

the issues in dispute and thus established the scope of the jury's function. It involved the second clause of the Seventh Amendment ("no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law"), while the present case involves the first clause. Collateral estoppel does not involve "re-examination" of the verdict of a jury. At all events, for the reasons discussed at pages 18-19, *supra*, the common law supports the application of collateral estoppel even when that doctrine limits the issues triable to a jury.

C. Concern About Jury Trials Does Not Authorize A Court To Stay Injunctive Proceedings Brought By The Government

The court of appeals stated (Pet. App. 14a):

> Were there any doubt about the [question whether there is a need for a jury to resolve issues otherwise subject to collateral estoppel] it should in any event be resolved against the defendants in this case for the reason that, although they were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs, either by seeking to expedite trial of the present action or by requesting Judge Duffy, in the exercise of his discretion pursuant to Rule 39(b), (c), F. R. Civ. P., to order that the issues in the SEC case be tried by a jury or before an advisory jury. [Footnote omitted.]

The court of appeals apparently saw this comment as implementing the concern expressed in *Beacon Theatres* and *Dairy Queen* that equity actions not needlessly precede legal actions in a way that reduces the issues triable to juries. We believe, however, that *Katchen* disposes of these concerns and that the court of appeals' *dicta*, if adopted by this Court, would diminish the effectiveness of the Commission's actions without producing any benefits to the public or to litigants.[16]

The Commission's action was authorized by two statutes (see page 20, *supra*). The remedies available to the Commission are equitable, and neither Act provides for a jury trial in proceedings instituted by the Commission. This Court repeatedly has recognized that a litigant is entitled to a jury trial only if the case is of the type traditionally brought in an action at law. See, *e.g.*, *Pernell* v. *Southall Realty*, *supra*. An action by the Commission under the federal securities laws "was not known at common law. And if it had been, it would have been one at equity." *Bradford* v. *Securities and Exchange Commission*, 278 F.2d 566, 567 (C.A. 9).[17]

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[16] Petitioners attack the court of appeals' *dicta* (Br. 27-32), and respondent does not attempt to support the court in this respect (Br. 33-34).

[17] See also *Securities and Exchange Commission* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 94-97 (C.A. 2); *Securities and Exchange Commission* v. *Associated Minerals, Inc.*, 75 F.R.D. 724, 725-726 (E.D. Mich.), petition for writ of mandamus denied, C.A. 6, No. 77-1422, decided September 8, 1977; *Securities and Exchange Commission* v. *Petrofunds, Inc.*, 420 F. Supp. 958, 959-960 (S.D. N.Y.), appeal by defendant dismissed with prejudice, C.A. 2, No. 76-6184, decided April 12, 1977. See also 5 Moore's *Federal Practice*, ¶ 38.24 [1] (1977).

This Court has never suggested that suits for equitable relief, such as proceedings brought by the Commission, should be tried before a jury.[18] Indeed, *Atlas Roofing Co.*, *supra*, reaffirmed the principle that only actions at law need be tried to a jury. Any requirement that equitable or administrative actions be tried to a jury could handicap the ability of the courts and administrative agencies to provide prompt and efficient relief in many kinds of cases.

> [The Seventh Amendment] did not purport to require a jury trial where none was required before. Moreover, it did not seek to change the factfinding mode in equity or admiralty nor to freeze equity jurisdiction as it existed in 1789, preventing it from developing new remedies where those available in courts of law were inadequate. [430 U.S. at 459.]

See also *United States* v. *Louisiana*, 339 U.S. 699, 706; *Shields* v. *Thomas*, 18 How. 253, 262. And no one—not even the court of appeals—has identified any benefit in empaneling an advisory jury in the Commission's injunctive actions. The advisory jury could delay or complicate the injunctive case (cf. *Muniz* v. *Hoffman*, 422 U.S. 454), yet it would not bind the court or add anything to the collateral estoppel effect of the decision. See 5 Moore's *Federal Practice* ¶ 39.10

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[18] See *Katchen* v. *Landy*, *supra*, 382 U.S. at 337-339.

[1], p. 730 (1977). See also *Securities and Exchange Commission* v. *Wills*, CCH Fed. Sec. L. Rep. ¶ 96,321 (D. D.C.); *Securities and Exchange Commission* v. *Hart*, CCH Fed. Sec. L. Rep. ¶ 96,454 (D. D.C.).

What is more, by adopting Section 21(g) of the Securities Exchange Act of 1934, as added, 89 Stat. 155, 15 U.S.C. 78u(g),[19] Congress has endeavored to prevent delays in the Commission's proceedings that might be caused by parallel private actions. The legislative history of Section 21(g) elaborates the congressional concern:

> If not hindered by the possibility of transfer and consolidation with claims of private litigants, [the Commission] is then in a position to seek prompt preventive relief by way of an injunction. To delay the Commission action while administering the pretrial phase of the private actions is to risk leaving the defendants in the Commission's suit free to continue their potentially fraudulent conduct, and thus cause new losses to other investors.

S. Rep. No. 94-75, 94th Cong., 1st Sess. 76 (1975). Accordingly, courts should not require the Commission

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[19] Section 21(g) of the Securities Exchange Act provides in part:

> Notwithstanding the provisions of section 1407(a) of title 28, United States Code, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

to await the resolution of private actions before advancing to trial in enforcement proceedings, and they should not impose any requirements that might unnecessarily delay trial of the Commission's suits. Private actions, often filed as class or derivative suits, may consume years for pretrial discovery alone. The Commission's ability to protect the public during this period would be seriously impaired if injunctive proceedings were postponed at the request of private litigants or delayed by requests for jury trials. See *Securities and Exchange Commission* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 96-97 (C.A. 2).

In sum, although we agree with the holdings of the court below, we believe that the court's *dictum* is not a necessary element in its analysis or an appropriate view of the procedures to be used in the Commission's suits.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1978.

APPENDIX

A STATISTICAL PROFILE OF SECURITIES LITIGATION IN THE FEDERAL COURTS

CIVIL CASES FILED IN THE DISTRICT COURTS [1]

Actions	1973	1974	1975	1976	1977
Total actions	98,560	103,530	117,320	130,597	130,567
Securities, commodities and exchange actions	1,999	2,378	2,408	2,230	1,960
Securities, commodities and exchange actions as percent of total actions	2.03	2.30	2.05	1.71	1.50

[1] Based on the Annual Report of the Administrative Office of the United States Courts for the Twelve Month Period Ended June 30, 1977, Table 11 (1978).

CIVIL CASES PENDING FOR THREE OR MORE YEARS

Year	Cases pending Three or More Years	SC&E [1] Cases Pending Three or More Years	SC&E Cases As Percent Of Cases Pending Three Or More Years
1977 [2]	11,835	1,007	8.51
1976 [3]	9,414	834	8.86
1975 [4]	7,563	744	9.84
1974 [5]	7,352	682	9.28
1973 [6]	7,602	528	6.95

[1] Securities, commodities and exchange actions.

[2] Annual Report of the Administrative Office of the United States Courts for the Twelve Month Period Ended June 30, 1977, Table 16 (1978).

[3] Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1976, Table 22 (1977).

[4] Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1975, Table 22 (1976).

[5] Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1974, Table 47 (1975).

[6] Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1973, Table 28 (1974).

CIVIL TRIALS REQUIRING 20 OR MORE DAYS

Year	Total Civil Trials	Civil Trials Requiring 20 or More Days	Civil Trials Requiring 20 or More Days as Percent of Total	Total SC&E [1] Trials	SC&E Trials Requiring 20 or More Days	SC&E Trials Requiring 20 or More Days as Percent of All SC&E Trials
1977 [2]	11,604	56	.48	321	7	2.18
1976 [3]	11,656	69	.59	335	11	3.28
1975 [4]	11,603	45	.39	353	5	1.42
1974 [5]	10,972	48	.44	301	7	2.33
1973 [6]	10,896	54	.50	257	6	2.33
TOTAL	56,731	272		1,567	36	

[1] Securities, commodities and exchange actions.

[2] Annual Report of the Administrative Office of the United States Courts for the Twelve Month Period Ended June 30, 1977, Table C-8 (1978).

[3] Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1976, Table C-8 (1977).

[4] Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1975, Table C-8 (1976).

[5] Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1974, Table C-8 (1975).

[6] Annual Report of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1973, Table C-8 (1974).

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